No. _____

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In the Supreme Court of the United States

ODYSSEY CONTRACTING CORPORATION
and ODYSSEY PAINTING COMPANY, INC.,
Petitioners,

v.

MARYLAND CASUALTY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Pennsylvania Compensation Rating Bureau, ("PCRB") is a rating organization which adopted a written appeals procedure as mandated by the provisions of 77 P.S. § 1035.17. The PCRB's appeals procedure was set forth in Rule XVI, entitled "Appeals From Application of the Rating System Procedure." Rule XVI mandated that an aggrieved party had to make its written request for review within 12 months of the policy period in which the application was made. Rule XVI was not officially promulgated as an administrative regulation. It was included in the private publication of the PCRB known as the Pennsylvania Workers' Compensation Manual of Rules, Classification & Rating Values for Workers Compensation and for Employers Liability Insurance. (the "Manual").

The State courts enforced Rule XVI against the policyholders who failed to comply with its provisions. As a consequence, the petitioners were denied the opportunity to defend a contract action which sought to collect alleged unpaid premiums exceeding $140,000.00 and pursuit of a counterclaim. The petitioners contend that they have been deprived of their property without due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The question presented is as follows:

1. Whether enforcement of a Workers's Compensation statute, 77 § 1035.17 and the unpublished PCRB' Manuals Rule XVI which sets forth rules and procedures for filing appeals before the rating organization, deprives petitioners of their property without due process of law, in violation

of Section 1 of the 14th Amendment to the Constitution of the United States.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Petitioner: Odyssey Contracting Corporation

Petitioner: Odyssey Painting Company, Inc.

Respondent: Maryland Casualty Company

CORPORATE DISCLOSURE STATEMENT

Neither Odyssey Contracting Corporation nor Odyssey Painting Company, Inc. have any parent corporation. No publicly held companies hold 10% or more of the corporations' stock.

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

The Memorandum and Order of the Trial Court entered June 15, 2004, granting judgment on the pleadings, is unreported, but is contained in Appendix A.

The Trial Court's denial of the Motion for Reconsideration entered July 14, 2004, is unreported but is contained in Appendix B.

The Superior Court of Pennsylvania's Order entered July 19, 2005, withdrawing its July 12, 2005 opinion is reported at 2005 Pa.Super 257, 2005 Pa.Super LEXIS 2233 and is contained in Appendix C.

The Superior Court's Opinion entered on February 9, 2006 affirming the grant of judgment on the pleadings is reported at 2006 Pa. Super. 25, 2006 Pa.Super. LEXIS 64, 894 A.2D 750 and is contained in Appendix D.

The Superior Court's Order of Court entered April 17, 2006 denying an Application for Reargument, is reported at 2006 Pa.Super. LEXIS 614 and is contained at Appendix E.

The Supreme Court of Pennsylvania's Order, entered November 1, 2006, denying petitioners' Petition for Allowance of Appeal, is reported at 909 A.2d 1290, 2006 Pa.LEXIS 2099 and is contained at Appendix F.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on November 1, 2006. The jurisdiction of this Court

is invoked under 28 U.S.C. § 1257(a). This petition is timely filed. 28 U.S.C. § 2101(c). 28 U.S.C. § 2403(b) may apply, and this Petition for Writ of Certiorari shall be served upon the Attorney General of the Commonwealth of Pennsylvania.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Constitution Provision Involved

"No State shall....deprive any person of ....property, without due process of law." *USCS Const. Amend. 14, § 1*.

Pennsylvania Statute Involved

§ 1035.17. Requests for review; appeals to commissioner

(a) Each rating organization and every insurer to which this article applies which makes its own rates shall provide within this Commonwealth reasonable means whereby any person aggrieved by the application of its rating system may be heard in person or by the person's authorized representative on the person's written request to review the manner in which such rating system has been applied in connection with the insurance afforded the aggrieved person. For the purposes of this section, "reasonable means" shall include at least the following:

(1) A committee to hear the appeals of aggrieved persons which is comprised of an equal number of representatives of employers and insurers.

(2) If travel is required for the aggrieved person to be heard in person, reimbursement to the aggrieved person for reasonable travel expenses.

(b) If the rating organization or insurer fails to grant or reject the aggrieved person's request within thirty (30) days after it is made, the applicant may proceed in the same manner as if the application had been rejected.

(c) Any party affected by the action of that rating organization or insurer on the request may, within thirty (30) days after written notice of that action, make application in writing for an appeal to the commissioner, setting forth the basis for the appeal and the grounds to be relied upon by the applicant.

(d) The commissioner shall review the application and, if the commissioner finds that the application is made in good faith and that it sets forth on its face grounds which reasonably justify holding a hearing, the commissioner shall conduct a hearing held on not less than ten (10) days' written notice to the applicant and to the rating organization or insurer. The commissioner, after hearing, shall affirm or reverse the action. *77 P.S. § 1035.17*

Underwriting Rule of the Pennsylvania Compensation Rating Bureau

RULE XVI – Appeals From Application of the Rating System Procedure

A. Any person, corporate or otherwise, aggrieved by an application of the rating system of the Pennsylvania Compensation Rating Bureau..... must commence any

appeal of an application of the rating system within twelve (12) months of the policy period in which the application was made by filing an appeal directly with the Bureau in accordance with this Procedure. [the full text of this section is contained in Appendix H].

No citation is available since the provision is contained only in the "Pennsylvania Workers' Compensation Manual of Rules, Classification & Rating Values for Workers Compensation and for Employers Liability Insurance" (the "PCRB's Manual"), a private publication. The full text of the Rule XVI is set forth in Appendix I.

CONCISE STATEMENT OF THE CASE

Before the Trial Court

Maryland Casualty Company issued a Worker's Compensation Insurance Policy (the "Policy") to Odyssey Contracting Corporation and Odyssey Painting Company, Inc., (collectively "Odyssey") for the policy period 01/01/99 to 01/01/00. The Odyssey corporations were Pennsylvania based-employers involved in the bridge painting business in various states.

The Policy contained rate schedules for each state. Each states' rate schedule included in the Policy incorporated a federal and state rates for the classifications of labor listed. Calculation of the final premium due under the insurance contract involved a factual determination whether the actual work performed by employees during the policy year occurred in either the federal or state jurisdiction, in which event the relevant rate already contained in the policy would be applied to the employers' payroll expense. The final

premium due under the policy was to be determined by audit conducted by the insurer after the close of the policy year.

Maryland sued Odyssey by filing a complaint more than 12 months following the end of the policy year. It claimed that the final premium due as determined by audit was $336,321.00 less a credit for payments of $195,793.00, leaving a balance due of $140,528.00 for which it sought judgment.

Odyssey defended the action by alleging that the actual premium due was $244,342.00 of which $242,892.00 had been paid, leaving an unpaid balance of $1,449.01, which sum was offset by other sums due Odyssey.

It its response to Maryland's complaint, Odyssey also filed a counterclaim alleging a statutory bad faith action against Maryland under 42 Pa.C.S. § 8371. Odyssey sought recovery of punitive damages, attorney's fees and costs on the basis that Maryland breached its fiduciary duty and duty of good faith and fair dealing by conducting a fraudulent final audit by knowingly using the higher federal rates in circumstances where the lower state rate should have been applied.

Maryland filed a Motion for Judgment on the Pleadings relying upon the statutory provision set forth in 77 P.S. § 1035.17 and Rule XVI set forth in the Pennsylvania Compensation Rating Bureau's ("PCRB") Manual contending that Odyssey, as a "person aggrieved by the application of the [Bureau's] rating system," should have pursued the matter before the Pennsylvania Compensation Rating Bureau. According to Maryland, Odyssey should have pursued its appeal of the application of the rating system within the 12-month period following the close of the policy year. Maryland argued that Rule XVI had the force of law.

Odyssey argued that Rule XVI was not promulgated in the law, nor in the code of regulations, nor mentioned in the Policy and should not be enforced as legally binding.

The trial court rejected Odysseys' view and concluded that Rule XVI was the rating organization's response to the statutory provision 77 P.S. § 1035.17 (a) which required that rating organizations to provide a procedure for review of claims by any aggrieved person as to the application of insurance rates. According to the trial court, Rule XVI provided a full, complete and adequate remedy. The Trial Court thus concluded that it lacked the power to exercise jurisdiction over the contract dispute, and on June 15, 2004, granted the insurer's Motion for Judgment on the Pleadings in the amount of $140,528.00 (See the Memorandum and Order, Appendix H).

The trial court never addressed the issue of the unconstitutionality of the statute or Rule XVI. The Trial Court was asked to reconsider its decision, but it declined to do so (See Exhibit B).

Before the Superior Court of Pennsylvania

A timely appeal to the Superior Court of Pennsylvania followed. Since the constitutionality of a the workers compensation statute and the "PCRB's Manual procedure Rule XVI were called into question, notice was provided to the Attorney General of the Commonwealth of Pennsylvania, who chose not to participate in the proceedings before the Superior Court.

On February 9, 2006, the Superior Court affirmed the Trial Court's grant of Judgment on the Pleadings, and its Opinion, is contained at Exhibit C.

The Superior Court agreed with the Trial Court's rationale and reliance upon Rule XVI of the PCRB's Manual. It upheld the constitutionality of 77 P.S. § 1035.17 and concluded that Rule XVI was legally enforceable, holding that petitioners had not directly challenged its constitutionality.

On April 17, 2006, the Superior Court refused reargument and its Order is contained in Exhibit E.

Before the Supreme Court of Pennsylvania

A timely Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania. Notice was again provided to the Attorney General of the Commonwealth of Pennsylvania, who chose not to participate in the proceedings before the Supreme Court.

The Supreme Court of Pennsylvania's Order of November 1, 2006, denying Odysseys' Petition for Allowance of Appeal, is contained at Appendix F.[1]

---

[1] In the interim the Pennsylvania Compensation Rating Bureau filed a Petition for Leave to file an Amicus Brief in Support of the Petition for Allowance of Appeal, but the Supreme Court denied the request. The Bureau agreed with the policyholders that it was not the forum in which to resolve a contract dispute where the rates themselves were not challenged. It deemed the controversy as a contract dispute, and not a dispute involving the application of its rating system.

REASONS FOR GRANTING THE WRIT

I. PENNSYLVANIA DENIES DUE PROCESS TO PERSONS AGGRIEVED BY THE APPLICATION OF ITS WORKERS' COMPENSATION RATING SYSTEM BY ENFORCING RULES AND REGULATIONS WHICH ARE NOT OFFICIALLY ADOPTED AND PROMULGATED.

Under Pennsylvania's Workers" Compensation Act, persons aggrieved by the application of the rating organization's rating system[2] may file an appeal to the insurance commissioner, but only after complying with an unnamed rating organization's unspecified appeals process. That appeals process was not publically available in any statute, rule or regulation. Yet, it unfairly determined the outcome of this case.

The Workers' Compensation Act, including section 1035.17, which deals with appeals to the commissioner, does not disclose the identity of the rating organization to which reference is made. As discussed, *infra.*, neither this section nor any other statutory provision or administrative regulation provides public notice that the identity of the relevant rating organization is the Pennsylvania Compensation Rating Bureau. Thus, any aggrieved person seeking to follow the appeals procedure, will have an initial impediment to the inquiry, since it will not be known whose procedures are being sought. Section 1035.17 merely informs that a

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[2] Pennsylvania permits insurers to function as rate-makers, and they are accorded the same duty as a rating organizations. This distinction is not pertinent to the pending controversy.

procedure exists and that some unspecified process must be followed as a pre-requisite to appeals to the commissioner.

In upholding the constitutionality of the section 1035.17 of the Workers Compensation Law, the Superior Court of Pennsylvania described a methodology, which if followed, would ostensibly lead the aggrieved person to the Pennsylvania Compensation Rating Bureau and its manual of rules, including Rule XVI containing 12-month limitation period. The methodology which the Superior Court assured would render the process constitutional was as follows:

> It is clear on the face of section 1035.17 that the rating organizations must establish "reasonable means" to hear grievances and that the insurance commissioner is required, upon request, to review any action taken pursuant to the filing of any such grievance. The fact that rules will be promulgated to effectuate this grievance procedure is implicit in section 1035.17 and the other provisions of Chapter 7B of the Workers Compensation Law." (Appendix 19a).
>
> 77 P.S. § 1035.17. This section does not stand alone and must be read *in pari materia* with all of the related provisions set forth in Chapter 7B of the Workers' Compensation Act which also deal with insurance rates. **See** 77 P.S. §§ 1035.1-1035.22 (setting forth legislative provisions established to protect policyholders and the public against adverse effect of excessive, inadequate or unfairly discriminatory rates). (Appendix 18a).

Further, the Superior Court instructs that Chapter 7B must be interpreted in accordance with the provisions of Title 45 Sections 1102 *et seq.* (pertaining to legal notices and

advertisements of agency rule making and the adoption of regulations by administrative agencies). See also 2 Pa.C.S.A §§ 101-754 (Administrative Law and Procedure); 1 Pa. Code Chapter 7 (setting forth procedures for adoption or change of administrative agency regulations); 1 Pa Code Chapter 11 (establishing procedures for preparation of notices, rule making proposals and unpublished regulations for administrative agencies); 31 Pa. Code § 56.1 (indicating that with certain exceptions 1 Pa. Code §31.1 and 1 Pa. Code Part II (relating to general rule of administrative practice and procedure) apply to proceedings before the Insurance Department). (Appendix 19a).

While the court's recommended methodology appears reasonable, conducting such a review does not lead to the Pennsylvania Compensation Rating Bureau, nor to its manual containing the appeals process, Rule XVI. Such a review actually demonstrates that the commissioner and the rating organization both failed to comply with the statutory and regulatory process to promulgate rules to implement a statute and adopt binding regulations.

Firstly, the twenty-one enumerated sections set forth in Chapter 7B speak generically of "rating organizations." For example, a rating organizations is subject to supervision and to examination by the commissioner, (section 1035.3); it shall file filings, and that the Secretary of Labor and Industry shall be a member of its board of directors or governing body (section 1035.5); that its filings are open to public inspection (1035.6); that its membership shall consist of each and every workers' compensation insurance carrier doing business in Pennsylvania subject to the provisions of the Workers' Compensation law (section 1035.7).

In other words, the rating organization contemplated by the Workers' Compensation Law is to be a private corsortium of insurance carriers, subject to the supervision of the commissioner, on whose board sits the Secretary of Labor and Industry.

Section 1035.7 also defines the relationship between an insurer and its rating organization, and the duties of the rating organization, which include developing and filing rules reasonably related to the recording and reporting of data pursuant to the uniform statistical plan, the uniform experience rating plan and the uniform classification system. Section 1035.9 deals with the commissioner's review of rate filings made by rating organizations while section 1035.12 advises that rating organizations are to be licensed by the commissioner.

In section 1035.17, which is the subject of this challenge, rating organizations are given the statutory task to formulate the appeals process whereby aggrieved persons are provided a remedy to have their grievances heard before the rating organization as a prelude to an appeal to the insurance commissioner. No other provisions in Chapter 7 speaks to the subject of appeals, or to the rules which govern the appeals process.

What does clearly emerge from a review of Chapter 7B, however, is that the rating organization contemplated by the act is to be intertwined with the State, to such an extent that when it acts, its act constitutes state action as shall be more fully developed, *infra*.

The Superior Court also reasoned in its opinion that the Workers Compensation Law withstood constitutional challenge because the *in pari materia* review would also

consider other Pennsylvania law and administrative procedures. These additional sources would ostensibly provide the constitutional underpinnings to support the Workers' Compensation law, section 1035.17, and Rule XVI set forth in the PCRB manual. Here again, the results of the review do not lead to the Pennsylvania Compensation Rating Bureau nor to its Manual. To the contrary, such a review makes clear that the insurance commissioner, and/or its licensed rating organization, the PCRB, have completely failed to promulgate the appeals rules set forth in Rule XVI in accord with Pennsylvania law.

The subject matter of, Title 45 (45 P.S. §§ 1201-1208) deal with legal notices and advertisements, and describes the procedure for the official adoption of administrative rules: section 1201 deals with the notice of proposed rule making; section 1202 with the adoption of regulations; section 1203 with the effective date of regulations; section 1204 with the omission of notice of proposed rule making; section 1205 with the approval as to legality of the proposed regulations; section 1206 with the format of regulations and other documents; section 1207 with deposit of agency text of regulations required.

Significantly, under section 1208, unfiled regulations are void.

> An administrative regulation or change therein promulgated after the effective date of this act shall not be valid for any purpose until filed by the Legislative Reference Bureau, as provided in section 409. 45 P.S. § 1208.

Petitioners alleged in their pleadings and throughout the appeals in the State Courts that the PCRB manual, and Rule

XVI, were not contained in the statutory material nor the code. Had the process for adoption of rules and regulations been followed, the appeals procedure set forth in Rule XVI would have formed a part of the Pennsylvania Code. Neither the PCRB nor its manual of underwriting rules would have remained obscure, and the process to perfect an appeal would have been available to anyone who cared to look.

Since the Superior Court could not offer a citation in its opinion with reference to Rule XVI of the Worker's Compensation Manual (since it had not been promulgated in accordance with Title 45), the Superior Court then proceeded to take "judicial notice" of its existence, citing another Pennsylvania intermediate appellate court case with took judicial notice of Worker's Compensation Manual. *Graduate Health System, Inc. v. Pennsylvania Insurance Department, 674 A.2d 367 (Pa. Cmwlth 1996)*. This is an apparent attempt to ground Rule XVI on some legal underpinning.

"Judicial notice" simply means that the Superior Court recognized Rule XVI as being the law to apply in the case, but it begs the question as to whether such a rule was constitutionally defective for lack of being properly promulgated at a time when it mattered to the policyholders.

The Superior Court declared that it had relied upon Rule XVI in reaching its decision. (Appendix at 28a).

"It declared that an "administrative agency" has the power to adopt rules with respect to the administration of a statute when the statute specifically empowers the agency to do so." (Appendix 19a). As noted above, the Pennsylvania Compensation Rating Bureau is not a government entity although the term "Bureau" confusingly connotes that it is accorded the status. If the Superior Court was intending

therefore to take judicial notice of an administrative agency's rules and regulations, it failed in that regard as well.

The Superior Court may have wrongly decided the status of Rule XVI, but its decision, as upheld by the Supreme Court of Pennsylvania, is the state of Pennsylvania law on the subject. In other circumstances where the state has erred in its construction of statutes, the United States Supreme Court has said:

> Whether the state court erred in its construction of the state .... statutes, is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State, *W. v. La., 194 U.S. 258, 261 (U.S. 1904)*.

> The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.. *W. v. La., 194 U.S. 258, 263 (U.S. 1904)*.

It is submitted that Rule XVI had precisely that effect: the procedure worked a denial of a fundamental right of due process and conflicted with Section 1 of the 14th Amendment of the Constitution of the United States by depriving the petitioners of their property without due process.

It is undoubtably true that a state can regulate access to its adjudicatory processes, provided that in doing so, it does not breach some fundamental constitutional right.

> "[What] the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo, 380 U.S. 545, 552 (1965)* (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co., supra, at 313.* The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, "within the limits of practicability," id., at 318, [**787] a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. *Boddie v. Connecticut, 401 U.S. 371, 378-379 (U.S. 1971)*

The aggrieved persons had no meaningful way to defend the action or to prosecute their counterclaims. They could not have known that their day in court had already passed, since the process which they were to follow was so wholly obscure to them. Justice requires that the judgment entered be reversed and the case remanded.

II. ALTHOUGH THE ORIGINS OF RULE XVI WERE WITH THE PENNSYLVANIA COMPENSATION RATING BUREAU, THE DENIAL OF DUE PROCESS CONSTITUTED STATE ACTION BECAUSE OF THE STATUTORY DUTIES DELEGATED TO THE BUREAU AND ITS ROLE IN THE REGULATORY PROCESS OF RATE-MAKING UNDER THE WORKERS' COMPENSATION REGIME.

As discussed above, although PCRB is a consortium of private insurance companies who write workers' compensation insurance in the Commonwealth, it is under the supervision of the commissioner, and the Secretary of Labor and Industry is a member of its board. It is thus a hybrid organization, not wholly private, yet not arising to a government agency. As further developed, *supra.*, its role in the rate-making process is exquisitely set forth in Chapter 7B of the Workers' Compensation Law.

This Court has previously enunciated a test to determine whether the action of a private entity can constitute "state action." In American Manufacturers Mutual Insurance Company, et. al., vs. Sullivan, *526 U.S. 40, 119 S. Ct. 977; 143 L. Ed. 2d 130; 1999 U.S. LEXIS 1711 (1999)* this Court declared with regard to a private entity that it:

> will not be held to constitutional standards unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself." *Ibid.* Whether such a nexus exists, depends on, among other things, whether the State has provided such significant encouragement, either overt

> or covert, that the choice must in law be deemed to be that of the State. E.g., ibid. [citing additional cases]. See *American, p. 1712.*
>
> ...state action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and that "the [***144] party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar, v. Edmondson Oil Co., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)*; see *Flagg Bros., Inc. v. Brooks, 436 U.S. 149,156, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). Id. 1712.*

Given the varied duties imposed on the rating organization by the Workers Compensation Act and its central role in the rate-making and appeals process, and its supervision by the commissioner, and having a cabinet level board member on its Board, it is submitted that the Pennsylvania Compensation Rating Bureau is a state actor for determining the due process rights of the petitioners. It was the creator of Rule XVI, which petitioners argued was repugnant and which denied them due process, being the gravamen of their complaint against the PCRB. *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777, at 1004 (1982).*

III. THE DENIAL OF DUE PROCESS RESULTED IN A DEPRIVATION OF A SUBSTANTIAL PROPERTY INTEREST.

It seems apparent without argument, that the loss of $140,000.00 in contract damages, plus interest, and the loss of the ability to pursue and recover punitive damages,

attorneys fees and costs under Pennsylvania's "bad faith statute," 42 Pa.C.S. § 8371 describes a substantial deprivation of property.

CONCLUSION

The outcome of this case is so palpably unfair, that justice requires that the outcome be reversed and that petitioners be granted a hearing on the merits. As the Superior Court stated in its opinion:

> We are sympathetic to Appellants' position that it is unfair that requests for review of insurance rate structures as applied by an insurer are governed by rules that are not readily identifiable and accessible to the general public. While we might like to decide this case differently, we are forced to acknowledge that something that seems "unfair" is not always unconstitutional. (Appendix 20a).

Petitioners have demonstrated that the appeals rules were not readily identifiable to anyone, except to those who fortuitously knew of their existence. "Unfair due process," is no due process at all. Due process cannot be based upon fortuity. For all of the foregoing reasons, petitioners respectfully request that this Court issue a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

Robert J. Amelio
Counsel of Record
8150 Perry Highway, Suite 201
Pittsburgh, PA 15237
(412) 364-6180

Counsel for Petitioners

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

No. 260 WAL 2006

[Filed November 1, 2006]

MARYLAND CASUALTY COMPANY, Respondent	)
v.	)
ODYSSEY CONTRACTING CORPORATION AND ODYSSEY PAINTING COMPANY, INC., Petitioners	)

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM:

AND NOW, this 1st day of November, 2006, the Petition for Allowance of Appeal is **DENIED.**

A True Copy John A. Vaskov
As of: November 1, 2006
Attest: /s/ _____
John A. Vaskov
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 44 WM 2006

[Filed June 30, 2006]

MARYLAND CASUALTY COMPANY	)
	)
v.	)
	)
ODYSSEY CONTRACTING CORPORATION AND ODYSSEY PAINTING COMPANY, INC.,	)
	)
PETITION OF: PENNSYLVANIA COMPENSATION RATING BUREAU	)
	)

ORDER

PER CURIAM

AND NOW, this 30th day of June, 2006, the Petition for Leave to File a Brief in Support of Petition for Allowance of Appeal is denied.

A True Copy Patricia Nicola
As of: June 30, 2006
Attest: /s/
Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX C

The Superior Court of Pennsylvania
Office of the Prothonotary
GRANT BUILDING
310 GRANT STREET, SUITE 600
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KAREN REID BRAMBLETT, ESQUIRE
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April 17, 2006

Robert Amelio, Esquire
The Executive Building
8150 Perry Highway Suite 201
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IN RE: MARYLAND CASUALTY V ODYSSEY CONTRACTING
NO. 1227 WDA 2004

Dear Mr. Amelio:

The court has entered the following order on your Application for Reargument filed in the above captioned matter.

"ORDER OF COURT

The court hereby DENIES the application filed February 23, 2006, requesting reargument or reconsideration of the decision dated February 9, 2006.
DATE: April 17, 2006 PER CURIAM"

Very truly yours,

/s/ _____
Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV/ksj
cc: Sandy Garfinkel, Esquire
Honorable David Gilmore

APPENDIX D

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1227 WDA 2004

[Filed February 9, 2006]

MARYLAND CASUALTY COMPANY,
Appellee

v.

ODYSSEY CONTRACTING CORPORATION AND ODYSSEY PAINTING COMPANY, INC.,
Appellants

Appeal from the Order entered June 15, 2004, in the Court of Common Pleas of Washington County, Civil, at No. 2002-2855.

BEFORE: HUDOCK, POPOVICH and JOHNSON, JJ.

OPINION BY HUDOCK, J.:

This is an appeal from an order that granted judgment on the pleadings. We affirm.

Appellee, Maryland Casualty Company (Maryland Casualty), initiated the action underlying this appeal by filing a complaint in the court of common pleas on May 7, 2002. Maryland Casualty alleged that Appellants (Odyssey Contracting Corporation and Odyssey Painting Company, Inc.) were in breach of contract for failure to pay all of the premiums owed for workers' compensation insurance coverage. Specifically, Maryland Casualty sought damages in the amount of $140,528.00 plus interest from June 28, 2000, and costs. Appellants filed a counterclaim asserting that Maryland Casualty intentionally and knowingly applied an improper rate classification to calculate the exposures and to inflate the amount of premiums due.

The matter proceeded through discovery until August of 2003, when Maryland Casualty filed a motion for judgment on the pleadings against Appellants. The trial court heard argument and received briefs on the matter. On June 15, 2004, the trial court granted Maryland Casualty's motion. The docket indicates that notice was provided to the parties on June 16, 2004. Appellants filed a motion for reconsideration, which the trial court denied. Appellants' timely notice of appeal was filed on July 14, 2004. Although the trial court did not require Appellants to file a Rule 1925(b) statement, a full trial court opinion has been filed. Appellants present two issues for our consideration:

A. If a worker's compensation insurance policy incorporates more than one rate to distinguish between maritime exposures arising under the Longshore and Harbor Workers Act[1] versus land-based exposures arising under various

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[1] 33 U.S.C.§§ 901-950.

states' workers' compensation statutes, should the court of common pleas exercise its subject matter jurisdiction to adjudicate a dispute between a policy holder and insurer concerning whether the proper policy rate was selected to calculate the final premium due by the terms of the policy?

B. Assuming arguendo that there was an administrative appeals process to be followed, is the Worker's Compensation Act unconstitutional as it applies to these policyholders for its failure to provide adequate notice of the 12-month limitation to initiate an administrative appeals process?

Appellants' Brief at 4.

As our Supreme Court has explained, appellate review of a trial court's decision to grant or deny judgment on the pleadings is limited to determining whether the trial court committed an error of law or whether there were facts presented which warrant a jury trial. *Travelers Casualty & Surety Company v. Castegnaro,* 772 A.2d 456, 459 (Pa. 2001). In conducting this review, we look only to the pleadings and any documents properly attached thereto. *Id.*, 772 A.2d at 459. "Judgment on the pleadings is proper only where the pleadings evidence that there are no material facts in dispute such that a trial by jury would be unnecessary." *Id.*, 772 A.2d at 459.

> In passing on a challenge to the sustaining of a motion for judgment on the pleadings, our standard of review is limited. We must accept as true all well pleaded statements of fact of the party against whom

> the motion is granted and consider against him only those facts that he specifically admits. We will affirm the grant of such a motion only when the moving party's right to succeed is certain and the case is so free from doubt that the trial would clearly be a fruitless exercise.

Minnich v. Yost, 817 A.2d 538, 540 (Pa. Super. 2003), *appeal denied*, 827 A.2d 1202 (Pa. 2003)

Appellants first argue that the trial court improperly determined that an adequate administrative remedy exists to address their counterclaim that Maryland Casualty applied an incorrect final premium rate when charging for workers' compensation insurance coverage. Appellants assert that the policy issued by Maryland Casualty incorporates more than one rate depending on whether the coverage stems from maritime exposures arising under the Longshore and Harbor Workers Act versus land-based exposures arising under other statutory mandates. The trial court found that it lacked subject matter jurisdiction to adjudicate Appellants' counterclaim because Appellants failed to seek the appropriate administrative remedy before the Pennsylvania Compensation Rating Bureau. Trial Court Opinion, 6/15/04, at 4.

Our Supreme Court has held that "[i]t is fundamental that prior to resorting to judicial remedies, litigants must exhaust all the adequate and available administrative remedies." *County of Berks, ex rel. Baldwin v. Pennsylvania Labor Relations Board*, 678 A.2d 355, 360 (Pa. 1996). The failure to pursue a statutory remedy may be raised at any point in a proceeding by the parties or by the Court *sua sponte* because such failure creates a jurisdictional defect. *Muir v. Alexander*, 858 A.2d 653, 660 (Pa. Cmwlth. 2004). Section 1504 of the Statutory Construction Act of 1972 provides that in all cases

where a statutory remedy is provided or a duty is enjoined by any statute, the statutory remedy shall be strictly pursued rather than a remedy at common law. 1 Pa.C.S.A. § 1504. A court is without power to act until statutory remedies have been exhausted. *Muir*, 858.A.2d at 660. Indeed, as this Court has explained, the courts of this Commonwealth have consistently held that when a remedy is provided by an act of assembly, the directions of the legislation must be strictly pursued and such remedy is exclusive. *Panea v. Isdaner*, 773 A.2d 782, 789 (Pa. Super. 2001) (*en banc*), *aff'd sub nom. Bell v. Slezak*, 812 A.2d 566 (Pa. 2002).

"Even where a constitutional question is presented, it remains the rule that a litigant must ordinarily follow statutorily-prescribed remedies." *Muir*, 858 A.2d at 660. "The additional element required to confer equitable jurisdiction is either the absence of a statutorily-prescribed remedy or, if such a remedy exists, then a showing of its inadequacy in the circumstances." *Id.* (quoting *Borough of Green Tree v. Board of Property Assessments, Appeals and Review of Allegheny County*, 328 A.2d.819, 823 (Pa. 1974)). Our Supreme Court has explained the rationale for the doctrine that administrative remedies must be exhausted before seeking relief from courts, stating as follows:

> When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and. broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, at least initially, by the administrative agency.

Muir, 858 A.2d at 660 n.17 (quoting *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 793 (Pa. 1977)). The purpose of the doctrine is to preserve the integrity of the administrative process. *Id.* In determining whether a litigant will be excused from exhausting administrative remedies, courts must look to whether an adequate administrative remedy exists. *County of Berks*, 678 A.2d at 360. A litigant will be allowed to bypass seeking administrative relief before a state agency if that agency has no mandate to provide the requested remedies. *Id.* However, our Supreme Court has ruled that a litigant cannot be permitted "to circumvent the administrative process where the litigant can achieve full relief in front of the agency but the relief may be granted on bases different from those advocated by the litigant." *Id.*

In the present case, the trial judge has explained why he reached the conclusion that Appellants could have sought the relief they now request had they pursued a timely claim before the Pennsylvania Compensation Rating Bureau (the Bureau). Trial Court Opinion, 6/15/04, at 3-4. The trial court's decision rests, in part, on provisions contained within the Pennsylvania Workers Compensation Manual issued by the Bureau. This manual has been made a part of the certified record and was properly considered by the trial court. *See Graduate Health Systems, Inc. v. Pennsylvania Insurance Department*, 674 A.2d 367, 368 n.2 (Pa. Cmwlth. 1996) (holding that it is proper for a court to take judicial notice of the Workers Compensation Manual if a copy of it has been placed in the original record). We agree with the trial court's reasoning and with its reliance on the provisions of Rule XVI (Appeals From Application of the Rating System Procedure) in the Workers Compensation Manual.

We are cognizant of Appellants' contention that the Bureau has no authority to adjudicate a contracts dispute.

While this may be true, it does not alter the fact that the Bureau does have the authority to rule in a dispute over the application of rate classifications in a given case. Pennsylvania Workers Compensation Manual, Rule XVI (C). The courts of common pleas do not acquire authority to grant a remedy within the sole purview of the Bureau merely because the parties to a contracts dispute also dispute a particular insurance rate classification. We agree with the trial court that to hold otherwise would circumvent the administrative remedy established to deal with disputes such as the one between the parties in this case.

Appellants next contend that section 1035.17 of Title 77 provides no notice that there is a twelve-month limitation period for filing an administrative appeal challenging a rate classification. Appellants argue that this lack of notice constitutes a denial of procedural due process. Thus, Appellants assert that section 1035.17 is unconstitutional.

In Pennsylvania, the Attorney General is the Commonwealth officer statutorily charged with defending the constitutionality of all enactments passed by the General Assembly. *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 583 (Pa. 2003) (citing 71 P.S. § 732-204(a)(3)). The nature of the constitutional challenge and the opinion of any other state officer make no difference to this requirement. *Id.*, 838 A.2d at 583-84. Notice must be provided to the Attorney General, if the Commonwealth is not a party, whenever a litigant challenges the constitutionality of a statute in any court subject to the Pennsylvania Rules of Civil Procedure. Pa.R.C.P. 235. If the statute continues to be challenged on appeal, the Attorney General must be afforded a separate and additional notice pursuant to Pennsylvania Rule of Appellate Procedure 521. When the constitutionality of an act of the General Assembly is challenged on appeal, the Attorney

General stands in representative capacity for, at a minimum, all non-Commonwealth parties having an interest in seeing the statute upheld. *City of Philadelphia*, 838 A.2d at 584. As such, the Attorney General must be afforded notice of any appeal that raises the alleged unconstitutionality of a statute. *Id.* In this case, the record indicates that Appellants complied with the notice requirements in both the trial court and on appeal.

The next question is whether Appellants are barred from raising their constitutional challenge on grounds that they did not originally present the claim to the relevant administrative agency. The failure to exhaust administrative remedies is jurisdictional in nature and may be raised by the parties or by a court *sua sponte*. *Brog v. Commonwealth Department of Public Welfare*, 401 A.2d 613, 615 (Pa. Cmwlth. 1979).[2] The primary purpose of the exhaustion doctrine is to ensure that claims will be addressed by the body having expertise in the area. *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 275 (Pa. 2003). This is particularly true when agency interpretation of relevant statutes or regulations is desirable. *Id.* An exception to this exhaustion doctrine exists to permit a litigant to challenge the constitutionality of a statutory scheme. *Id.* Constitutional challenges are of two kinds: either the challenge assails the statute on its face or it questions the application of the statute in a specific case. *Id.*

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[2] This Court is not bound by decisions of the Commonwealth Court. *Citizens' Ambulance Service Inc. v. Gateway Health Plan*, 806 A.2d 443, 446 n.3. (Pa. Super. 2002), *appeal denied*, 819 A.2d 546 (Pa 2003). However, such decisions provide persuasive authority, and we may turn to our colleagues on the Commonwealth Court for guidance when appropriate. *Id.*

> In a facial challenge, a party is not required to exhaust administrative remedies because the determination of the constitutionality of enabling legislation is not a function of the administrative agencies thus enabled. Accordingly, facial challenges to a statute's constitutionality need not be raised before the administrative tribunal to be reviewed by an appellate court; challenges to a statute's application, however, must be raised before the agency or are waived for appellate review. . . . [R]equiring "as applied" challenges to be heard at the administrative level permits the agency to exercise its expertise and develop the factual record necessary to resolve the claim.

Id., 839 A.2d at 275.

Appellants present a two-fold due process claim, which challenges the manner in which section 1035.17 applies in this specific case but also goes to the validity of the enabling statute itself. The latter claim is not confined to the manner in which the provision was applied in this particular case. We do not have jurisdiction to address Appellants' argument concerning the application and impact of the statute under the specific circumstances of this appeal because that issue was not presented to the administrative tribunal in the first instance. However, to the extent that Appellants challenge the constitutionality of the enabling legislation as a general matter, we conclude that this aspect of the appeal falls within the exception to the exhaustion doctrine and that we have jurisdiction to consider Appellants' argument.

Review of a statute's constitutionality is deferential because there is a strong presumption that an enactment of the General Assembly is constitutionally firm. *Weinberg v.*

Comcast Cablevision of Philadelphia, L.P., 759 A.2d 395, 398 (Pa. Super. 2000). Our Supreme Court has warned that, in keeping with the strong presumption of validity enjoyed by all duly enacted legislation, as well as the need to preserve the delicate balance critical to the proper functioning of a tripartite system of government, courts must exercise restraint when asked to invalidate legislation. *City of Philadelphia*, 838 A.2d at 580. This is particularly true where failure to do so could intrude upon the prerogatives of a coordinate branch of government. *Id.*

An appellant bears a heavy burden to prove that a statute is unconstitutional. *Ieropoli v. AC&S Corporation*, 842 A.2d 919, 928 (Pa. 2004). This burden of persuasion rests on the party challenging the statute. *Id.* A statute will be declared unconstitutional only if it clearly, palpably and plainly violates the constitution. *City of Philadelphia*, 838 A.2d at 585. All doubts are to be resolved in favor of a finding of constitutionality. *Commonwealth v. Aponte*, 855 A.2d 800, 803 (Pa. 2004), *cert. denied*, 543 U.S. 1063 (2005). Pennsylvania courts are duty bound to construe a statute, if at all possible, so as not to render it unconstitutional:

> The "canon of constitutional avoidance" provides that when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *See Harris v. United States*, 536 U.S. 545, 555, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 53 L. Ed. 836, 29 S. Ct. 527 (1909)). Pennsylvania explicitly recognizes this canon by statute in instances where construction of a Pennsylvania statute is at issue. See 1 Pa.C.S.

§ 1922; *see also Commonwealth v. Bavusa*, 574 Pa. 620, 832 A.2d 1042, 1050-51 (Pa. 2003).

MCI Worldcom, Inc. v. Pennsylvania Public Utility Commission, 844 A.2d 1239, 1249 (Pa. 2004).

The crux of Appellant's constitutionality argument is the assertion that, standing alone, the text of section 1035.17 of Title 77 does not afford notice that agency regulations provide only a twelve month time period in which to file a claim pursuant to the statute. We agree with Appellants that section 1035.17 does not give notice, on its face, as to the time period in which a claimant may initiate action. However, we cannot agree that the statute is unconstitutional on that basis.

Section 1035.17 contains the following language:

Requests for review; appeals to commissioner

(a) Each rating organization and every insurer to which this article applies which makes its own rates shall provide within this Commonwealth reasonable means whereby any person aggrieved by the application of its rating system may be heard in person or by the person's authorized representative on the person's written request to review the manner in which such rating system has been applied in connection with the insurance afforded the aggrieved person. For the purposes of this section, "reasonable means" shall include at least the following:

(1) A committee to hear the appeals of aggrieved persons which is comprised of an equal number of representatives of employers and insurers.

(2) If travel is required for the aggrieved person to be heard in person, reimbursement to the aggrieved person for reasonable travel expenses.

(b) If the rating organization or insurer fails to grant or reject the aggrieved person's request within thirty (30) days after it is made, the applicant may proceed in the same manner as if the application had been rejected.

(c) Any party, affected by the action of that rating organization or insurer on the request may, within thirty (30) days after written notice of that action, make application in writing for an appeal to the commissioner, setting forth the basis for the appeal and the grounds to be relied upon by the applicant.

(d) The commissioner shall review the application and, if the commissioner finds that the application is made in good faith and that it sets forth on its face grounds which reasonably justify holding a hearing, the commissioner shall conduct a hearing held on not less than ten (10) days' written notice to the applicant and to the rating organization or insurer. The commissioner, after hearing, shall affirm or reverse the action.

77 P.S. § 1035.17. This section does not stand alone and must be read *in pari materia* with all of the related provisions set forth in Chapter 7B of the Workers' Compensation Act, which also deal with insurance rates. *See* 77 P.S. §§ 1035.1-1035.22 (setting forth legislative provisions established to protect policyholders and the public against the adverse effect of excessive, inadequate or unfairly discriminatory rates). In turn, Chapter 7B cannot be viewed in isolation, but must be

interpreted in accordance with the provisions of Title 45, sections 1102 *et seq.* (pertaining to legal notices and advertisements of agency rule making and the adoption of regulations by administrative agencies). *See also* 2 Pa.C.S.A. §§ 101-754 (Administrative Law and Procedure); 1 Pa. Code Chapter 7 (setting forth procedures for adoption or change of administrative agency regulations); 1 Pa. Code Chapter 11 (establishing procedures for preparation of notices, rulemaking proposals and unpublished regulations for administrative agencies); 31 Pa. Code § 56.1 (indicating that, with certain exceptions, 1 Pa. Code. § 31.1 and 1 Pa. Code Part II (relating to general rule of administrative practice and procedure) apply to proceedings before the Insurance Department).

An administrative agency has the authority to adopt rules with respect to the administration of a statute when the statute specifically empowers the agency to do so. *Bailey v. Zoning Board of Adjustment of the City of Philadelphia*, 801 A.2d 492, 500 (Pa. 2002). "Nevertheless, even where a statute does not explicitly provide an agency with rule-making powers, if the agency is directed to operate under the statute, the agency may also create rules concerning its administration of the statute based on its interpretation of the statute." *Id.*, 801 A.2d at 501. It is clear on the face of section 1035.17 that the rating organizations and insurers governed by the statute must establish "reasonable means" to hear grievances and that the insurance commissioner is required, upon request, to review any action taken pursuant to the filing of any such grievance. The fact that rules will be promulgated to effectuate this grievance procedure is implicit in section 1035.17 and the other provisions of Chapter 7B of the Workers' Compensation Law.

Appellants have not cited to any statutory provision or to any case law indicating that implementing legislation must set forth the provisions of any agency rules or regulations established under color of the implementing statutory authority. Nor has our independent research uncovered any such requirement. Rather, an administrative agency is expected to promulgate all necessary rules in compliance with the relevant notice provisions of Titles 2 and 45, *supra*. Appellants have not challenged the constitutionality of the manner in which the pertinent agency rules were promulgated, nor have they raised a claim that the specific agency **rules** implicated by this appeal operate to deprive all claimants of their due process rights. Appellants contend only that the implementing legislation itself is unconstitutional.

We are sympathetic to Appellants' position that it is unfair that requests for review of insurance rate structures as applied by an insurer are governed by rules that are not readily identifiable and accessible to the general public. While we might like to decide this case differently, we are forced to acknowledge that something that seems "unfair" is not always "unconstitutional." Appellants have not demonstrated that section 1035.17 operates any differently than any other such implementing statute so as to render this particular provision unconstitutional. Thus, Appellants have failed to overcome the presumption that the statute is constitutionally firm.

Order affirmed.

Judgment Entered:

/s/ _____

Deputy Prothonotary

DATE: FEBRUARY 9, 2006

APPENDIX E

The Superior Court of Pennsylvania
Office of the Prothonotary

GRANT BUILDING
310 GRANT STREET, SUITE 600
PITTSBURGH, PA 15219-2297

DAVID A. SZEWCZAK, ESQUIRE
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July 19, 2005

Robert Amelio, Esquire
The Executive Building
8150 Perry Highway Suite 201
Pittsburgh, PA 15237-5232

IN RE: MARYLAND CASUALTY V ODYSSEY CONTRACTING CORPORATION - NO. 1227 WDA 2004

Dear Mr. Amelio:

The court has entered the following order on the above captioned appeal.

"ORDER OF COURT

AND NOW, to-wit, this 19th day of July, 2004, the Opinion by Hudock, J., filed July 12, 2005, in the above matter is hereby WITHDRAWN.

Per curiam"

Very truly yours,

/s/ _____
Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV/ksj
Cc: Sandy Garfinkel, Esquire
Honorable David Gilmore

APPENDIX F

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1227 WDA 2004

[Filed July 12, 2005]

MARYLAND CASUALTY COMPANY,
Appellee

v.

ODYSSEY CONTRACTING CORPORATION AND ODYSSEY PAINTING COMPANY, INC.,
Appellants

Appeal from the Order entered June 15, 2004, in the Court of Common Pleas of Washington County, Civil, at No. 2002-2855.

BEFORE: HUDOCK, POPOVICH and JOHNSON, JJ.

OPINION BY HUDOCK, J.:

This is an appeal from an order that granted judgment on the pleadings. We affirm.

Appellee, Maryland Casualty Company (Maryland Casualty), initiated the action underlying this appeal by filing a complaint in the court of common pleas on May 7, 2002. Maryland Casualty alleged that Appellants (Odyssey Contracting Corporation and Odyssey Painting Company, Inc.) were in breach of contract for failure to pay all of the premiums owed for workers' compensation insurance coverage. Specifically, Maryland Casualty sought damages in the amount of $140,528.00 plus interest from June 28, 2000, and costs. Appellants filed a counterclaim asserting that Maryland Casualty intentionally and knowingly applied an improper rate classification to calculate the exposures and to inflate the amount of premiums due.

The matter proceeded through discovery until August of 2003, when Maryland Casualty filed a motion for judgment on the pleadings against Appellants. The trial court heard argument and received briefs on the matter. On June 15, 2004, the trial court granted Maryland Casualty's motion. The docket indicates that notice was provided to the parties on June 16, 2004. Appellants filed a motion for reconsideration, which the trial court denied. Appellants' timely notice of appeal was filed on July 14, 2004. Although the trial court did not require Appellants to file a Rule 1925(b) statement, a full trial court opinion has been filed. Appellants present two issues for our consideration:

A. If a worker's compensation insurance policy incorporates more than one rate to distinguish between maritime exposures arising under the Longshore and Harbor Workers Act[1] versus land-based exposures arising under various states'

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[1] 33 U.S.C. §§ 901-950.

workers' compensation statutes, should the court of common pleas exercise its subject matter jurisdiction to adjudicate a dispute between a policy holder and insurer concerning whether the proper policy rate was selected to calculate the final premium due by the terms of the policy?

B. Assuming arguendo that there was an administrative appeals process to be followed, is the Worker's Compensation Act unconstitutional as it applies to these policyholders for its failure to provide adequate notice of the 12-month limitation to initiate an administrative appeals process?

Appellants' Brief at 4.

As our Supreme Court has explained, appellate review of a trial court's decision to grant or deny judgment on the pleadings is limited to determining whether the trial court committed an error of law or whether there were facts presented which warrant a jury trial. *Travelers Casualty & Surety Company v. Castegnaro*, 565 Pa. 246, 250, 772 A.2d 456, 459 (2001). In conducting this review, we look only to the pleadings and any documents properly attached thereto. *Id.* at 250-51, 772 A.2d at 459. "Judgment on the pleadings is proper only where the pleadings evidence that there are no material facts in dispute such that a trial by jury would be unnecessary." *Id.* at 251, 772 A.2d at 459.

> In passing on a challenge to the sustaining of a motion for judgment on the pleadings, our standard of review is limited. We must accept as true all well pleaded statements of fact of the party against whom the motion is granted and consider against him only those facts that he specifically admits. We will affirm

> the grant of such a motion only when the moving party's right to succeed is certain and the case is so free from doubt that the trial would clearly be a fruitless exercise.

Minnich v. Yost, 817 A.2d 538, 540 (Pa. Super. 2003), *appeal denied*, 573 Pa. 710, 827 A.2d 1202 (2003)

Appellants first argue that the trial court improperly determined that an adequate administrative remedy exists to address their counterclaim that Maryland Casualty applied an incorrect final premium rate when charging for worker's compensation insurance coverage. Appellants assert that the policy issued by Maryland Casualty incorporates more than one rate depending on whether the coverage stems from maritime exposures arising under the Longshore and Harbor Workers Act versus land-based exposures arising under other statutory mandates. The trial court found that it lacked subject matter jurisdiction to adjudicate Appellants' counterclaim because Appellants failed to seek the appropriate administrative remedy before the Pennsylvania Compensation Rating Bureau. Trial Court Opinion, 6/15/04, at 4.

Our Supreme Court has held that "[i]t is fundamental that prior to resorting to judicial remedies, litigants must exhaust all the adequate and available administrative remedies." *The County of Berks ex rel. Baldwin v. Pennsylvania Labor Relations Board*, 544 Pa. 541, 550, 678 A.2d 355, 360 (1996). The failure to pursue a statutory remedy may be raised at any point in a proceeding by the parties or by the court *sua sponte* because such failure creates a jurisdictional defect. *Muir v. Alexander*, 858 A.2d 653, 660 (Pa. Cmwlth. 2004). Section 1504 of the Statutory Construction Act of 1972 provides that in all cases where a statutory remedy is provided or a duty is enjoined by any statute, the statutory remedy shall

be strictly pursued rather than a remedy at common law. 1 Pa.C.S.A. § 1504. A court is without power to act until statutory remedies have been exhausted. *Muir*, 858 A.2d at 660. Indeed, as this Court has explained, the courts of this Commonwealth have consistently held that when a remedy is provided by an act of assembly, the directions of the legislation must be strictly pursued and such remedy is exclusive. *Panea v. Isdaner*, 773 A.2d 782, 789 (Pa. Super. 2001) (*en banc*), *aff'd sub nom. Bell v. Slezak*, 571 Pa. 333, 812 A.2d 566 (2002), *appeal denied*, 841 A.2d 532 (2003).

"Even where a constitutional question is presented, it remains the rule that a litigant must ordinarily follow statutorily-prescribed remedies." *Muir*, 858 A.2d at 660. "The additional element required to confer equitable jurisdiction is either the absence of a statutorily-prescribed remedy or, if such a remedy exists, then a showing of its inadequacy in the circumstances." *Id.* (quoting *Borough of Green Tree v. Board of Property Assessments, Appeals and Review of Allegheny County*, 459 Pa. 268, 276, 328 A.2d 819, 823 (1974)). Our Supreme Court has explained the rationale for the doctrine that administrative remedies must be exhausted before seeking relief from courts, stating as follows:

> When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, at least initially, by the administrative agency.

Muir, 858 A.2d at 660 n.17 (quoting *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 6, 383 A.2d 791, 793 (1977)). The purpose of the doctrine is to preserve the integrity of the administrative process. *Id.* In determining whether a litigant will be excused from exhausting administrative remedies, courts must look to whether an adequate administrative remedy exists. *County of Berks*, 544 Pa. at 551, 678 A.2d at 360. A litigant will be allowed to bypass seeking administrative relief before a state agency if that agency has no mandate to provide the requested remedies. *Id.* However, our Supreme Court has ruled that a litigant cannot be permitted "to circumvent the administrative process where the litigant can achieve full relief in front of the agency but the relief may be granted on bases different from those advocated by the litigant." *Id.*

In the present case, the trial judge has explained why he reached the conclusion that Appellants could have sought the relief they now request had they pursued a timely claim before the Pennsylvania Compensation Rating Bureau (the Bureau). Trial Court Opinion, 6/15/04, at 3-4. The trial court's decision rests, in part, on provisions contained within the Pennsylvania Workers Compensation Manual issued by the Bureau. This manual has been made a part of the certified record and was properly considered by the trial court. *See Graduate Health Systems, Inc. v. Pennsylvania Insurance Department*, 674 A.2d 367, 368 n.2 (Pa. Cmwlth. 1996) (holding that it is proper for a court to take judicial notice of the Workers Compensation Manual if a copy of it has been placed in the original record). We agree with the trial court's reasoning and with its reliance on the provisions of Rule XVI (Appeals From Application of the Rating System Procedure) in the Workers Compensation Manual.

We are cognizant of Appellants' contention that the Bureau has no authority to adjudicate a contracts dispute. While this may be true, it does not alter the fact that the Bureau does have the authority to rule in a dispute over the application of rate classifications in a given case. Pennsylvania Workers Compensation Manual, Rule XVI (C). The courts of common pleas do not acquire authority to grant a remedy within the sole purview of the Bureau merely because the parties to a contracts dispute also dispute a particular insurance rate classification. We affirm on the basis of the trial court opinion with regard to this issue.

Appellants next contend that section 1035.17 of Title 77 provides no notice that there is a twelve month limitation period for filing an administrative appeal challenging a rate classification. Appellants argue that this lack of notice constitutes a denial of procedural due process. Thus, Appellants assert that section 1035.17 is unconstitutional.

In Pennsylvania, the Attorney General is the Commonwealth officer statutorily charged with defending the constitutionality of all enactments passed by the General Assembly. *City of Philadelphia v. Commonwealth of Pennsylvania*, 575 Pa. 542, 570, 838 A.2d 566, 583 (2003) (citing 71 P.S. § 732-204(a)(3)). The nature of the constitutional challenge and the opinion of any other state officer make no difference to this requirement. *Id.* at 570-71, 838 A.2d at 583-84. Notice must be provided to the Attorney General, if the Commonwealth is not a party, whenever a litigant challenges the constitutionality of a statute in any court subject to the Pennsylvania Rules of Civil Procedure. Pa.R.C.P. 235. If the statute continues to be challenged on appeal, the Attorney General must be afforded a separate and additional notice pursuant to the Pennsylvania Rules of Appellate Procedure:

Rule 521. Notice to Attorney General of Challenge to Constitutionality of Statute

(a) Notice. It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record raising the issue, and to file proof of service of such notice.

(b) Status of Attorney General. The Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention. If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter.

Pa.R.A.P. 521. When the constitutionality of an act of the General Assembly is challenged on appeal, the Attorney General stands in representative capacity for, at a minimum, all non-Commonwealth parties having an interest in seeing the statute upheld. *City of Philadelphia v. Commonwealth*, 575 Pa. at 570, 838 A.2d at 584. As such, the Attorney General must be afforded notice of any appeal that raises the alleged unconstitutionality of a statute. *Id*.

In the present case, the certified record indicates that, on December 17, 2002, Appellants served notice upon the Attorney General's Office in both Pittsburgh and in

Harrisburg that they intended to draw into question the constitutionality of the Worker's Compensation Act in a trial court proceeding. *See* Proof of Service, 12/18/02 (indicating that service was effectuated on December 17, 2002). However, there is no indication of record that Appellants provided notice to the Attorney General that they had filed an appeal challenging the constitutionality of a Pennsylvania statute. Neither the trial court's docket nor the Superior Court docket reflect any such notice as having been served. Furthermore, the certified record contains no copy of such notice. We must therefore deem Appellants' constitutional challenge to be waived on appeal pursuant to the requirements of Rule 521.

Order affirmed.

Judgment Entered:

/s/ _____
Deputy Prothonotary

DATE: July 12, 2005

APPENDIX G

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA CIVIL DIVISION

No. 2002-2855

[Filed July 14, 2004]

MARYLAND CASUALTY COMPANY,
Plaintiff,

v.

ODYSSEY CONTRACTING CORPORATION AND ODYSSEY PAINTING COMPANY, INC.,
Defendants,

ORDER

AND NOW, this 14 day of July, 2004, after argument and in consideration of the briefs filed, Defendants' Motion for Reconsideration of the Memorandum and Order of this Court dated June 15, 2004, is hereby DENIED.

BY THE COURT:

/s/ _____
David L. Gilmore, P.J.

APPENDIX H

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA CIVIL DIVISION

No. 2002-2855

[Filed June 15, 2004]

MARYLAND CASUALTY COMPANY,
Plaintiff,

v.

ODYSSEY CONTRACTING CORPORATION AND ODYSSEY PAINTING COMPANY, INC.,
Defendants,

MEMORANDUM AND ORDER

Gilmore, P.J.
June 15, 2004

This matter is before the Court on the Plaintiff's, Maryland Casualty Company's ("Maryland"), Motion for Judgment on the Pleadings arising out of a Worker's Compensation and Employers Liability Insurance policy ("policy") issued by Plaintiff to the Defendants, Odyssey Contracting Corporation and Odyssey Printing Company, Inc.

("Odyssey"). More specifically, Maryland is asserting a claim for breach of contract alleging Defendants' failure to pay premiums due and owing for their policy of workers' compensation insurance effective during the year 1999. In their Counterclaim against Maryland, Defendants allege that Maryland's decision to apply a certain rate classification to Defendants' policy premiums was improper, and that Maryland knew it was improper, but that Maryland intentionally applied the rate classification to Defendants' policy premiums because Maryland intended to harm Defendants.

Plaintiff raises two arguments to support its Motion for Judgment on the Pleadings. The first argument raised by the Plaintiff is that the Defendants' failed to exhaust their administrative remedies; therefore, this Court lacks subject matter jurisdiction over the affirmative defenses and counterclaims of Defendants. The second argument raised by the Plaintiff is that the Defendants' Counterclaim under the Pennsylvania Bad Faith Statute fails as a matter of law.

Pa.R.C.P. 1034(a) provides that after the pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings. Judgment on the pleadings is proper only where the pleadings evidence that there are no material facts in dispute such that a trial by jury would be unnecessary. *Travelers Casualty & Surety Co. v. Castegnaro*, 772 A. 2d 456 (2001). A motion for judgment on the pleadings is similar to a demurrer; it may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *Miller v. Nelson*, 768 A.2d 858 (Pa. Super 2001); *appeal denied* 782 A.2d 547(2001). A motion for judgment on the pleadings will be granted where, on the facts averred, the law says with

certainty that no recovery is possible. *Lindstrom v. City of Corry*, 763 A.2d 394 (2000).

The first issue this Court needs to address is whether this Court has subject matter jurisdiction over the claims made by the parties. It is a generally accepted principle that a court does not have jurisdiction to address an action in law or in equity where an administrative remedy exists. *Colonial School District et al. v. Commonwealth of Pennsylvania Department of Education*, 602 A.2d 455 (Pa. Cmwlth. 1992), *citing Barr v. State Real Estate Commission*, 532 A.2d 1236 (Pa. Cmwlth. 1987). Furthermore, judicial review without either a proper record or an administrative adjudication would constitute a premature interruption of the administrative process. See *Nationwide Mutual Insurance Co. v. Insurance Department*, 583 A.2d 507 (Pa.Cmwlth. 1990). However, the exhaustion of administrative remedies rule is neither inflexible nor absolute, and the Pennsylvania Courts have established exceptions to the rule. A Court may exercise jurisdiction where the administrative remedy is inadequate. In *Johnson v. Southeastern Pennsylvania Transportation Authority*, 82 F.Supp.2d 420 (E.D. Pa. 2000), the Court stated that "the mere existence of a remedy does not dispose of the question of its adequacy; the administrative remedy must be 'adequate and complete'".

Pennsylvania's workers' compensation statutes appears 77 P.S. § 1035.1 et seq., relating to workers compensation insurance rates. This section provides for the establishment of a rating bureau and an appeals procedure for the application of rates to be administered by such rating bureau. The intent of the General Assembly can be found in 77 P.S. § 1035.1 (1) which is "to protect policyholders and the public against the adverse effect of excessive, inadequate or unfairly discriminatory rates." Furthermore, 77 P.S. § 1035.17(a)

requires that rating organizations must provide a procedure for review of claims by any aggrieved person as to the application of insurance rates. Specifically, 77 P.S. § 1035.17(a) states:

> Each rating organization and every insurer to which this article applies which makes its own rates shall provide within this Commonwealth reasonable means whereby any person aggrieved by the application of its rating system may be heard in person or by the person's authorized representative on the person's written request to review the manner in which such rating system has been applied in connection with the insurance afforded the aggrieved person.

The Defendant makes the argument that the statutory provision does not apply to the current controversy since it is a contract dispute between an insurer and an insured surrounding the performance of an audit of a workers' compensation policy to determine the final premium due and not a dispute between an insured and the rate-making authority. More specifically, the Defendants contend they are not aggrieved by the application of the rating system, but rather by the performance of an audit in breach of the express terms of the insurance contract. However, the Commission set up to hear disputes over workers' compensation claims is specifically designed to hear such claims as have been carefully pled in the Answer, New Matter and Counterclaim. As cited to earlier, the intent of the General Assembly as set forth in 77 P.S. § 1035.1 clearly demonstrates the power of the administrative proceedings is to protect policyholders against "excessive, inadequate or unfairly discriminatory rates."

If Defendants had a problem with the rates which were assigned to them, their recourse was to apply to the Commission for a review of their claims. The administrative remedies available to the Defendants' are fully adequate and capable of providing a review of the Plaintiff's application of the rates. There is clearly an administrative recourse for the Defendants' in this matter which is set forth in the "Pennsylvania Workers Compensation Manual". In particular, the "Pennsylvania Workers Compensation Manual" provides"

> Any person, corporate or otherwise, aggrieved by the application of the rating system of the Pennsylvania Compensation Rating Bureau...may appeal such application to the Bureau in accordance with this procedure... The aggrieved party must commence any appeal of an application of the rating system within twelve (12) months of the policy period in which the application was made by filing an appeal directly with the Bureau in accordance with this Procedure.

To assert subject matter jurisdiction over the appeal in this case would be to circumvent the appeal process and administrative remedy that was put in place to deal with such actions. The appropriate administrative procedure is set forth in the Pennsylvania Workers Compensation Manual and jurisdiction is provided by statute. Therefore, this Court finds that the administrative procedure is designed to deal with this type of action and the remedy in such an administrative procedure is adequate and complete. Accordingly, the Plaintiff's Motion for Judgment on the Pleadings is hereby GRANTED since the Defendants' have failed to exhaust their administrative remedy.

ORDER

AND NOW, this 15 day of June, 2004, after argument and in consideration of the briefs filed, Plaintiff's Motion for Judgment on the Pleadings is hereby GRANTED.

BY THE COURT:

/s/ _____
David L. Gilmore, P.J.

APPENDIX I

See Fold-Out Exhibit

Pennsylvania Workers Compensation Manual, Section 1,
Effective Date October 1, 2002
(excerpt pages 42-44)

C. AUDIT RIGHTS OF CARRIER

The insurance carrier has the right to compute earned premium based on an examination of original payroll records and books of account of the insured, in accordance with Part Five (Premium Audit) of the Standard Policy.

D. AUTHORIZED CLASSIFICATIONS

Classifications which are not expressed on the policy shall not be used in auditing the payroll of any risk upon which a Data Card has been issued by the Pennsylvania Compensation Rating Bureau, unless upon application to the Bureau Data Card may be revised.

RULE XVI – APPEALS FROM APPLICATION OF THE RATING SYSTEM PROCEDURE

A. Any person, corporate or otherwise, aggrieved by an application of the rating system of the Pennsylvania Compensation Rating Bureau (the "Bureau") as approved by the Insurance Commissioner pursuant to the Insurance Company Law of May 17, 1921, P.L. 682, as amended, (the "Law") and the Pennsylvania Workers' Compensation Act of June 2, 1915, P.L. 736, as amended (the "Act") may appeal such application to the Bureau in accordance with this Procedure. "Rating System" is defined herein to include but is not necessarily limited to the following: the assignment by the Bureau of an individual business to a particular classification, the continuation or discontinuation of an entity's (ies) previous experience to the experience rating of new ownership, an individual business' eligibility for or the percentage of credit under the Pennsylvania Construction Classification Premium Adjustment Program, the discount or surcharge applied to a business eligible for the Merit Rating Plan or any other workers compensation insurance pricing program filed by the Bureau with the Insurance Commissioner. The aggrieved party must commence any appeal of an application of the rating system within twelve (12) months of the policy period in which the application was made by filing an appeal directly with the Bureau in accordance with this Procedure.

B. An aggrieved party to which the rating system is found on appeal by an Appeals Subcommittee to have been improperly applied as of the time of the aggrieved party's appeal to the Bureau in accordance with this Procedure, may have such application amended effective only for the policy currently in effect at the time the aggrieved party first submitted its appeal to the Bureau, in accordance with Paragraph F. hereof, and for the immediately preceding expired policy. In the case of a multiple year policy, application of the rating system may be amended effective only for the policy year currently in effect at the time the aggrieved party first submitted its appeal to the Bureau, in accordance with Paragraph F. hereof, and for the policy year expiring no more than twelve (12) months prior to such appeal to the Bureau.

C An aggrieved party for which application of the rating system is revised as a result of a change in the Bureau's interpretation of the rating system approved for use by the Insurance Commissioner, may have such application amended effective as of the date determined by an Appeals Subcommittee of the Bureau's Classification and Rating Committee, which date may be prospective or retroactive as determined by the Appeals Subcommittee; provided however, that any retroactive effect shall not exceed the time period authorized in Paragraph B. hereof.

D. An aggrieved party for which application of the rating system is revised pursuant to a change to the rating system filed by the Bureau approved for use by the Insurance Commissioner, may have such application amended effective only upon the aggrieved party's first normal anniversary date on or later than the effective date of the change to the rating system — approved by the Insurance Commissioner.

E. Nothing in this Procedure shall permit an aggrieved party for which application of the rating system is revised on a new and renewal basis only to have such application amended effective before the aggrieved party's first normal policy anniversary date effective on or later than the effective date of the change to the rating system approved by the Insurance Commissioner.

F An aggrieved party who wants to appeal an application of the rating system must first submit a written request for review thereof to the Bureau together with all information in support of its appeal. The Bureau staff shall review the request and supporting information. To make certain the facts of an appeal are fully agreed upon by the Bureau and the appellant, the Bureau staff may (as circumstances warrant) visit the appellant's Pennsylvania work-place(s). The Bureau shall notify the appellant in writing of its final decision resulting from the Bureau staff's review. If the appellant is still aggrieved by the rating system application following completion of the Bureau staff's review and final decision, the appellant shall have the right to present its appeal to an Appeals Subcommittee of the Bureau's Classification and Rating Committee in accordance with the provisions of this Procedure. A further appeal by an appellant of the Appeals Subcommittee decision may be taken to the Insurance Commissioner pursuant to Section 654 of the Law and Section 717 of the Act, only after the appellant has first exhausted its rights pursuant to this Procedure.

G. Any party aggrieved by a final decision of the Bureau staff pursuant to Paragraph F. shall have the right to appeal to an Appeals Subcommittee of the Classification and Rating Committee of the Bureau. An Appeals Subcommittee shall be comprised of an equal number of public and insurer members. Any Appeals Subcommittee member having a direct pecuniary interest in the aggrieved party's appeal shall recuse its representative from the appeal proceeding.

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Such appeal must be received by the Bureau no later than ninety (90) days from the date of the Bureau staff's final decision referred to in Paragraph F.

H. All appeals pursuant to Paragraph G. hereof must be filed with the Bureau and must meet the following requirements:

1. The appeal must be in writing.

2. The appeal must set forth in detail the nature of the complaint, all reasons for believing the Bureau decision to be in error, all documents in support of the appeal, the specific nature of relief desired, and that the aggrieved party or its designated representative will appear before an Appeals Subcommittee of the Classification and Rating Committee at a to be determined hearing date. The Bureau urges the aggrieved party to appear before the Appeals Subcommittee as the aggrieved party is better able to respond to any questions the Appeals Subcommittee may have regarding the aggrieved party's business operations than a designated representative.

3. In the event an appeal does not fulfill the requirements of Paragraph H. 2. hereof the Bureau shall make a written request for the needed additional information from the aggrieved party, who shall have thirty (30) days to comply. Upon a written showing by the aggrieved party that the requested additional information cannot be provided within thirty (30) days, the Bureau may grant an extension consistent with the circumstances. If the requested additional information is not submitted within the specified time period, as extended, the appeal shall be dismissed.

I. Following receipt of an appeal to an Appeals Sub-committee of the Classification and Rating Committee, the Bureau will notify the appellant of the time and place of the Appeals Subcommittee meeting at which the matter shall be heard. The appeal shall be dismissed if an appellant, after due notice pursuant to Paragraph L. hereof, fails to be present or represented at three such scheduled hearings —.

J. The procedure at the hearing shall be as informal as possible and shall provide for the following steps:

1. The Chair of the Classification and Rating Committee shall introduce the appellant to the Appeals Subcommittee.

2. The appellant may at its option make an oral presentation of its case, or may rely solely upon the written material previously submitted to the Bureau in connection with the appeal.

3. Bureau staff members or consultants to the Bureau may present testimony and other information to the Appeals Subcommittee relating to the matter under consideration.

4. The appellant or the Bureau may also present witnesses and documentary evidence relevant to the appeal, and the appellant and the Bureau shall have the opportunity to direct questions to any witness who has testified before the Appeals Subcommittee on appeal.

5. After all testimony and other evidence have been presented, the hearing shall be declared closed by the Chair of the Committee and the appellant shall leave the hearing room. Such hearing may, in the discretion of the Appeals Subcommittee, be reopened at any time prior to the Appeals Subcommittee's decision.

6. After the hearing is closed, the Appeals Sub-committee shall arrive at its decision in executive session.

7. The decision shall be set forth in writing, shall specify all factual and other bases for the decision, and shall be sent to the appellant no later than thirty (30) days after the hearing.

8. The Appeals Subcommittee decision shall be included in the minutes of the meetings of the Classification and Rating Committee and be retained in the records of the Bureau.

9. The minutes of an Appeals Subcommittee of the Classification and Rating Committee meeting shall be kept by the Bureau staff. As hearings before the Appeals Subcommittee are as informal as possible there shall be no stenographic, audio or video record thereof.

10. If travel is required for the aggrieved person to be heard by the Appeals Subcommittee in person, the aggrieved person will be reimbursed for travel expenses in the same manner as members of the Appeals Subcommittee.

K. An appellant is not required to be represented by an attorney at any stage in any proceeding. However, an appellant has a right at the appellant's expense to be represented by an attorney. An appellant who is represented by an attorney shall — notify the Bureau in writing and shall also furnish the Bureau with the attorney's name and mailing address. After the Bureau has received such notification from an appellant, subsequent papers in the proceeding to be served on such appellant shall be served only upon the attorney designated by the appellant.

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L. Notices of any requirements for additional information pursuant to Paragraph H. 3. or of the time and place of the Appeals Subcommittee hearing shall be given to the appellant, or its attorney pursuant to Paragraph K., in writing personally or by certified mail (with return receipt). The notice of hearing shall be made at least ten (10) days in advance of such hearing, unless such notice is waived by the appellant or its attorney. When a meeting is adjourned to another time or place, written notice need not be given of the adjourned hearing if the time and place thereof are announced at the meeting during which all parties are present at which the adjournment is taken. All other notices, orders, papers, or communications, including a copy of the decision, may be served on an appellant by hand delivery or by regular first class mail to the appellant or its attorney at the last known mailing address provided to the Bureau.

M. During the course of all proceedings governed by this Procedure, the Appeals Subcommittee shall have the power to interpret and apply the foregoing Paragraphs, and such interpretation shall be binding upon the parties.

N. Appeals from a final decision of the Appeals Subcommittee pursuant to this Procedure must be filed with the Insurance Commissioner within thirty (30) days of the mailing date of the Committee's decision as provided in Section 654 of the Law and Section 717 of the Act.

O. Unless otherwise specifically provided by this Procedure, all periods of time shall be calculated from the postmark on materials sent by first class or certified mail through the United States Postal Service or the date of any hand delivery, whichever date is earlier.

P. Nothing contained in this Procedure shall prevent efforts to resolve any controversies governed by this Procedure on an informal basis at any stage of the proceedings before the Bureau or the Appeals Subcommittee.

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